NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In re: KEITH MASON, Debtor, _____ EDUCATIONAL CREDIT MANAGEMENT CORPORATION, Appellant, v. KEITH MASON, Appellee.	No. 04-35988 BAP Nos. ID 04-01075 BMaP ID 04-01077 BMaP MEMORANDUM*

Appeal from the Ninth Circuit
Bankruptcy Appellate Panel
Perris, Marlar, and Brandt, Bankruptcy Judges, Presiding

Argued and Submitted June 9, 2006
Seattle, Washington

Before: THOMPSON, TASHIMA, and CALLAHAN, Circuit Judges.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Educational Credit Management Corporation ("ECMC") appeals from the decision of the Bankruptcy Appellate Panel ("BAP"), which affirmed the bankruptcy court's partial discharge of government-insured student loans held by Debtor-Appellee Keith Mason ("Mason"). See Educ. Credit Mgmt. Corp. v. Mason (In re Mason), 315 B.R. 554 (B.A.P. 9th Cir. 2004). The bankruptcy court held that full repayment of the loans would cause Mason an undue hardship within the meaning of 11 U.S.C. § 523(a)(8), and discharged all amounts in excess of $32,400.[1] We have jurisdiction under 28 U.S.C. § 158(d), and we reverse.

"Because we are in as good a position as the BAP to review bankruptcy court rulings, we independently examine the bankruptcy court's decision, reviewing the bankruptcy court's interpretation of the Bankruptcy Code de novo and its factual findings for clear error." Miller v. Cardinale (In re DeVille), 361 F.3d 539, 547 (9th Cir. 2004) (citation and internal quotation marks omitted). Whether repayment of a student loan debt would impose an undue hardship is a question of law which we review de novo. Rifino v. United States (In re Rifino), 245 F.3d 1083, 1087-88 (9th Cir. 2001).

To determine if excepting student debt from discharge will impose an undue hardship, we apply the three-part test first enunciated in Brunner v. New York

[1] Mason owed ECMC approximately $100,000.

State Higher Education Service Corp., 831 F.2d 395, 396 (2d Cir. 1987). See United Student Aid Funds, Inc. v. Pena (In re Pena), 155 F.3d 1108, 1112 (9th Cir. 1998) (adopting the Brunner test). Under the Brunner test, the debtor must prove that: (1) he cannot maintain, based on current income and expenses, a "minimal" standard of living for himself and his dependents if forced to repay the loans; (2) additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period; and (3) the debtor has made good faith efforts to repay the loans. Id. at 1111; Brunner, 831 F.2d at 396. "[T]he burden of proving undue hardship is on the debtor, and the debtor must prove all three elements before discharge can be granted." In re Rifino, 245 F.3d at 1087-88 (citation omitted).[2]

"Good faith is measured by the debtor's efforts to obtain employment, maximize income, and minimize expenses." Pa. Higher Educ. Assistance Agency v. Birrane (In re Birrane), 287 B.R. 490, 499 (B.A.P. 9th Cir. 2002) (internal quotation marks and citations omitted); In re Pena, 155 F.3d at 1114. While Mason has minimized his expenses, he has not maximized his income, nor has he made adequate efforts to obtain full-time employment. Mason works only part-

[2] Because we reverse on the good faith prong, our analysis does not address the first two elements of the Brunner test.

time as a home siding installer, despite holding a bachelor's degree in philosophy and a law degree. Mason sought to justify his unwillingness to find a second part-time job on the ground that it would make it difficult for him to continue his ongoing search for a full-time position. The record belies this testimony, instead revealing that Mason's search for full-time employment has been inadequate in light of the significant free time his schedule provides him. See In re Birrane, 287 B.R. at 499-500 (finding lack of good faith, in part, because debtor declined to obtain a second part-time job).

Mason also claims that he is unable to seek work as an attorney because he cannot pass the bar exam. However, Mason made only one attempt to pass the Idaho bar exam, without requesting special testing accommodations, despite blaming his failure on his learning disability. Mason further testified that he does not intend to take the bar exam a second time, even though he acknowledged that he has substantial free time that he could dedicate to studying. See In re Pobiner, 309 B.R. 405, 418 (Bankr. E.D.N.Y. 2004) ("In general, courts have found that failure to pass the bar exam is not a sufficient reason for the discharge of student loans." (citations omitted)); In re Parks, 293 B.R. 900, 904 (Bankr. N.D. Ohio 2003) (refusing to discharge law school loans after debtor failed bar exam primarily due to insufficient effort to retake exam).

Finally, while Mason appears to have made some previous efforts to negotiate repayment of his debt, his efforts have been inadequate. The record demonstrates that Mason could have attempted renegotiation of his debt under the Income Contingent Repayment Plan ("ICRP"), but failed diligently to pursue this option. See In re Birrane, 287 B.R. at 500 (finding lack of good faith, where debtor previously made some effort in negotiating repayment of her student debt but failed to pursue ICRP option when it became available). For the foregoing reasons, we conclude that the bankruptcy court clearly erred in finding that Mason demonstrated good faith efforts to repay his loans.

Accordingly, the BAP's decision is **REVERSED and REMANDED** for further proceedings consistent with this decision.